WRITTEN DECISION NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re JIM CHARLES HARNSBERGER, Debtor.	Case No. 04-09005-B7 Adv. No. 05-90242-B7 ORDER ON REQUEST FOR DEFAULT JUDGMENT
JOHN R. MUNNS, Plaintiff, v. JIM CHARLES HARNSBERGER, Defendant.	

Plaintiff Munns seeks entry of a default judgment on his adversary complaint against debtor. In his complaint, Mr. Munns seeks a determination of nondischargeability under 11 U.S.C. § 523(a)(6), and also a denial of discharge under 11 U.S.C. § 727(a).

This Court has subject matter jurisdiction over the proceeding pursuant to 28 U.S.C. § 1334 and General Order

No. 312-D of the United States District Court for the Southern District of California. This is a core proceeding under 28 U.S.C. 157(b)(2)(I), (J).

There are multiple issues raised by plaintiff's request to enter a default judgment. The threshold ones are procedural, but may ultimately also be fatal to plaintiff's efforts. They concern service of the summons and complaint.

The first issue is that Rule 7004(b)(9) provides for service in the instance of an adversary proceeding. It provides:

> (9) Upon the debtor, after a petition has been filed, . . . by mailing a copy of the summons and complaint to the debtor at the address shown in the petition . . . and, if the debtor is represented by an attorney, to the attorney at the attorney's post-office address.

According to the returns of service of the summons filed by Mr. Munns, he did make service by mail on the debtor at the address on the petition. However, even though Mr. Munns identified debtor's attorney and listed his address on the cover sheet of the complaint, there is no indication on the multiple returns of service filed by plaintiff that the debtor's attorney was ever served with the summons and complaint, as Rule 7004(b)(9) requires. Curiously, in his Request to Enter Default (CSD 3030) plaintiff checked the box stating that service was made on the attorney pursuant to 7004(b)(9), but there is no corroborating evidence in the returns of service filed with the Court.

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Another possible issue, which the Court need not resolve at the present time, is the issue of who may make service upon a defendant in an adversary proceeding. As a general, and long-standing proposition, service had to be made by a person over 18 and not a party to the proceeding. See, e.g., Rule 7004(a)(1); Rule 4(c)(2), F.R.Civ.P. In the present case, the multiple returns of service on file with the Court all indicate plaintiff made the attempts at service himself, while at the same time signing the Proof of Service (form CSD 3007) certifying, under penalty of perjury, that he was "not less than 18 years of age and not a party to the matter concerning which service of process was made." But, of course, he is a party to the matter. The Court need not resolve that issue at the present time.

There are substantive concerns, as well. Plaintiff's complaint alleges that debtor "entered into a written business agreement to provide tax services . . .." (Paragraph 6) Then plaintiff alleges: "Debtor has failed to provide the services as agreed upon . . .." (Paragraph 7) Those are the only facts alleged in the complaint to support a claim of nondischargeability under § 523(a)(6). However, § 523(a)(6) requires much more than a breach of a contract. The subsection provides:

> (a) A discharge under section 727 . . . does not discharge an individual debtor from any debt -
>
> . . .
>
> (6) for willful and malicious injury

> by the debtor to another entity or to the property of another entity . . ..

The United States Supreme Court had occasion to consider the reach of § 523(a)(6) in Kawaauhau v. Geiger, 523 U.S. 57 (1998). There, the Court noted:

> The word "willful" in (a)(6) modifies the work "injury," indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury.

523 U.S. at 61. Accordingly, the Court held "that debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." 523 U.S. at 64.

The facts in Geiger help explain the holding. The plaintiff sought treatment for a foot injury from Dr. Geiger. He admitted her to the hospital for treatment and intentionally chose a course of oral penicillin over intravenous because of the plaintiff's desire to minimize cost, although he knew intravenous administration was more effective. Dr. Geiger left plaintiff in the care of other physicians and went on a business trip. On his return he found the doctors had referred the plaintiff to an infectious disease expert. He cancelled the referral and ordered the antibiotics discontinued because he thought the infection had subsided. Plaintiff lost her leg, sued, and obtained a judgment. Dr. Geiger carried no malpractice insurance, so the plaintiff chased him into bankruptcy. There, the bankruptcy court found the debt nondischargeable and the district court affirmed.

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A panel of the Eighth Circuit reversed, and the court *en banc* agreed, and held that § 523(a)(6) was "confined to debts 'based on what the law has for generations called an intentional tort.'" 523 U.S. at 60. Before the Supreme Court, plaintiff argued that "Dr. Geiger intentionally rendered inadequate medical care to [plaintiff] that necessarily led to her injury." Id. at 61. Plaintiff contended that Dr. Geiger "deliberately chose less effective treatment because he wanted to cut costs, all the while knowing that he was providing substandard care." Id. The Supreme Court affirmed the Eighth Circuit's decision and rejected the plaintiff's argument that Dr. Geiger's conduct met the "willful and malicious injury" standard of § 523(a)(6).

Subsequent to Geiger, in In re Jercich, 38 F.3d 1201 (2001), the Ninth Circuit explained:

> In Geiger, the U.S. Supreme Court held that debts arising out of a medical malpractice judgment, i.e., "debts arising from reckless or negligently inflicted injuries," do not fall with § 523(a)(6)'s exception to discharge. In so holding, the Court clarified that it is insufficient under § 523(a)(6) to show that the debtor acted willfully and that the injury was negligently or recklessly inflicted; instead, it must be shown not only that the debtor acted willfully, but also that the debtor inflicted the injury willfuly and maliciously rather than recklessly or negligently.

238 F.3d at 1207.

The Ninth Circuit next examined "the precise state of mind required to satisfy § 523(a)(6)'s 'willful standard.'" Id. The court concluded:

> We hold . . . that under Geiger, the willful injury requirement of § 523(a)(6) is met when it is shown either that the debtor had a subjective motive to inflict the injury or that the debtor believed that injury was substantially certain to occur as a result of his conduct.

238 F.3d at 1208. The court then defined the separate requirement of § 523(a)(6), maliciousness, as follows:

> A "malicious" injury involves "(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse."

238 F.3d at 1209.

Still more recently, the Ninth Circuit looked at § 523(a)(6) again, this time in In re Su, 290 F.3d 1140 (2002). There, debtor was driving a van in downtown San Francisco during the morning rush hour. He went speeding into an intersection when the light was already red, crashed into another car, then hit plaintiff, a pedestrian lawfully crossing the street. Plaintiff prevailed in state court and Mr. Su filed bankruptcy. The bankruptcy court found the debt nondischargeable under § 523(a)(6), but the BAP reversed, holding the court applied the wrong legal standard. The Ninth Circuit affirmed the BAP. As the Ninth Circuit put it:

> The question presented on appeal is whether a finding of "wilful and malicious injury" must be based on the debtor's subjective knowledge or intent or whether such a finding can be predicated upon an objective evaluation of the debtor's conduct.

290 F.3d at 1142. The court then stated its conclusion:

> We hold that § 523(a)(6)'s willful injury requirement is met only when the debtor has a subjective motive to inflict injury or when the debtor believed that injury is substantially certain to result from his own conduct.

Id.

In rejecting the objective standard used by the bankruptcy court, the appellate court stated its view:

> [F]ailure to adhere strictly to the limitation expressly laid down by In re Jercich will expand the scope of nondischargeable debt under § 523(a)(6) far beyond what Congress intended. By its very terms, the objective standard disregards the particular debtor's state of mind and considers whether an objective reasonable person would have known that the actions in question were substantially certain to injure the creditor. In its application, this standard looks very much like the "reckless disregard" standard used in negligence. That the Bankruptcy Code's legislative history makes it clear that Congress did not intend § 523(a)(6)'s willful injury requirement to be applied so as to render nondischargeable any debt incurred by reckless behavior reinforces application of the subjective standard. The subjective standard correctly focuses on the debtor's state of mind and precludes application of § 523(a)(6)'s nondischargeability provision short of the debtor's actual knowledge that harm to the creditor was substantially certain.

290 F.3d at 1145 - 1146.

As noted by the Ninth Circuit Court of Appeals some years ago: "It is well settled that a simple breach of contract is not the type of injury addressed by § 523(a)(6)." In re Riso, 978 F.2d 1151, 1154 (1992). That remains the law. In re Jercich, 238 F.3d 1202, 1205 (9th Cir. 2001). Again, the Court need not

decide whether plaintiff's complaint is legally sufficient to support a claim of nondischargeability under § 523(a)(6) at the present time. It is sufficient for the moment that plaintiff have a clearer understanding of the threshold he must meet to be successful. Even when the debtor makes no appearance, plaintiff can take a judgment of nondischargeability only if he is legally entitled to it.

In his complaint plaintiff also alleges that debtor should be denied a discharge under § 727(a). In support, he alleges:

> Although Debtor knew of the bankruptcy proceedings [sic] did not list John Munns as a creditor even though he prepaid for services never rendered. Further he manipulated his accounting to eliminate or otherwise conceal any credits owing John Munns.

While plaintiff has not indicated what subsection of § 727(a) he relies on, the gist of his complaint seems closest to § 727(a)(4)(A), which provides for denial of a discharge where a debtor makes a false oath. Because plaintiff was not listed in the schedules as a creditor, debtor's verification of his schedules was false. The Court has no opinion about the merits of such a claim on the present record, but would point out that the logic seems flawed. As a general proposition, the purpose of a Chapter 7 is to obtain a discharge of the debtor's personal liability on debts owed to creditors. However, if a creditor is not listed in the schedules and does not otherwise know of the bankruptcy, the debt may not be discharged, at least without an opportunity for the creditor to contest its dischargeability.

So, if a debtor omits a creditor from his schedules, it is the debtor's goal of obtaining a discharge of the debt that may be frustrated. Further, if a debtor has received advanced payment for services not subsequently rendered, it is an unusual case where covering up that fact, whether by showing a charge to the creditor or otherwise, would serve a purpose for the debtor. In other words, it does not generally gain a debtor anything by doing so. Unless some other evidence is brought forward the omission of a single creditor from a debtor's schedules is generally insufficient, without more, to support the substantial consequence of denial of a discharge of all dischargeable debts.

Plaintiff has supplemented his complaint with a declaration in support of the default judgment. In it, he asserts that debtor "committed a fraud by taking money with no intention to provide said services." Actual fraud may be a basis for nondischargeability under § 523(a)(6). However, plaintiff's argument is impeached just two sentences later when he states that one tax return was amended and filed, so at least part of the contracted-for service was performed. That, in turn, undercuts the argument that debtor had no intent to provide the contracted-for services, since he did perform part of it.

Plaintiff reiterates his assertion that debtor fraudulently added a $7,000 charge to plaintiff's account statement, thus suggesting that the funds prepaid by plaintiff had been used up by the $7,000 worth of services. Assuming that the fact is as stated by plaintiff, the Court is unable to see how that gives

debtor an advantage, or how it somehow puts plaintiff at a disadvantage. It is plaintiff's responsibility to show how such a fact, if true, meets a statutory standard for determining a particular debt nondischargeable, or establishing that debtor should be denied a discharge in its entirety.

Based on the record to date, and including the reasons set out above, the Court finds that plaintiff has failed to establish an entitlement to a judgment in his favor and against debtor on either count of his complaint. That being so, plaintiff's request for entry of a default judgment shall be, and hereby is denied, without prejudice.

IT IS SO ORDERED.

DATED: JUL - 7 2006

PETER W. BOWIE, Chief Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re Adv. Case No. 05-90242-B7
Case No. 04-09005-B7

CERTIFICATE OF MAILING

The undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

ORDER ON REQUEST FOR
DEFAULT JUDGMENT

was enclosed in a sealed envelope bearing the lawful frank of the Bankruptcy Judges and mailed to each of the parties at their respective address listed below:

Plaintiff:	Attorney for Defendant:
John R. Munns 1339 Orange Avenue, Suite 2 Coronado, CA 92118	Timothy C. Bryson, Esq. 2667 Camino del Rio South, Suite 102 San Diego, CA 92108

Said envelope(s) containing such document were deposited by me in a regular United States mail box in the City of San Diego, in said district on July 7, 2006.

Barbara J. Kelly

Barbara J. Kelly, Judicial Assistant